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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

STATE OF DELAWARE,

Plaintiff,

vs.

STATE OF NEW YORK,

Defendant.

BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT

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May 9, 1988

63 pp

Questions Presented

1. Is this case ripe in light of Delaware's failure to exercise its right to make a claim under New York's abandoned property law, as other states do, for any dividends which it can identify as having been abandoned by creditor brokers with Delaware addresses, as shown on the books and records of the brokers holding the unclaimed dividends, or by creditor brokers whose addresses cannot be determined from those records?

2. Should Delaware exhaust available administrative procedures for reviewing any possible adverse determinations on its claims to abandoned property?

3. Should this Court decline to exercise jurisdiction in a case which involves only complicated factual questions requiring time-consuming and costly reconstruction of millions of transactions and which raises no serious concerns of federalism?

4. Is New York entitled to custody of dividend and interest overpayments abandoned by creditor brokers which have New York addresses as shown by the books and records of debtor brokers?

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STATE OF DELAWARE,

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VS.

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Defendant.

BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT

STATEMENT OF THE CASE

Delaware's proposed complaint demonstrates that it has a profound misunderstanding of the facts of this case as they relate to this Court's decisions in *Texas v. New Jersey*, 379 U.S. 674 (1965), and *Pennsylvania v. New York*, 407 U.S. 206 (1972). It contends that the abandoned property at issue consists of dividend and interest overpayments owed by brokers incorporated in Delaware (debtor brokers) to customers (whose addresses supposedly are unknown) of other brokers and banks. As shown below, however, the overpayments are owed directly to other brokers and banks (creditor brokers), primarily located in New York, who have chosen not to assert claims to the abandoned property. In any event, this case is not ripe, Delaware failed to exhaust available administrative remedies, and exercise of original jurisdiction is not appropriate.

1. The rule in *Texas v. New Jersey* and *Pennsylvania v. New York*

In *Texas v. New Jersey*, this Court established clear rules for determining which states with conflicting claims to intangible personal property are entitled to escheat. In that case, the Court adopted the rule that "since a debt is the property of a creditor, not of the debtor, fairness among the States requires that the right and power to escheat the debt should be accorded to the State of the creditor's last known address as shown by the debtor's books and records." 379 U.S. at 680-81 (footnotes omitted). In adopting this rule, the Court expressly rejected the use of a creditor's domicile to determine which state could escheat:

> We agree with the Master that since *our inquiry is not concerned with the technical domicile of the creditor*, and since ease of administration is important where many small sums of money are involved, the address on the records of the debtor, which in most cases will be the only one available, should be the only relevant last-known address.

Id. at 681 n.11 (emphasis supplied).

The rule adopted was "a variation of the old concept of '*mobilia sequuntur personam*,' according to which intangible personal property is found at the domicile of its owner." *Id.* at 680 n.10. Thus, although the rule adopted was "in line" with a group of cases dealing with intangible personal property relying on the domicile of the creditor, it differed by employing last-known address as a substitute for domicile in the area of escheat. *See, e.g., Baldwin v. State of Missouri*, 281 U.S. 586 (1930); *Farmers' Loan & Trust Co. v. State of Minnesota*, 280 U.S. 204 (1930); *Blodgett v. Silberman*, 277 U.S. 1, 9-10 (1928).[1]

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[1] The Special Master explained that last known address was more appropriate in escheat cases than domicile:

> In such a proceeding, we are not concerned with litigation by private litigants in which the strict legal domicile of the litigants may be an important factor. We are concerned only with which of the two states shall take possession of property, its only claim thereto being that the lawful owner thereof died without heirs or successors. In such a proceeding, the address given to the debtor corporation should be sufficient to establish situs for escheat purposes.

Report of the Special Master at 24.

This Court gave four reasons for the last known address rule. First, "[a]doption of such a rule involves a factual issue simple and easy to resolve, and leaves no legal issue to be decided." 379 U.S. at 681. Second,

> [i]t takes account of the fact that if the creditor instead of perhaps leaving behind an uncashed check had negotiated the check and left behind the cash, this State would have been the sole possible escheat claimant; in other words, the rule recognizes that the debt was an asset of the creditor.

Id. Third, it "will tend to distribute escheats among the States in proportion of the commercial activities of their residents." *Id.* Fourth, "by using a standard of last known address, rather than technical legal concepts of residence and domicile, administration and application of escheat laws should be simplified." *Id.*

The rule applies to all creditors regardless whether the creditor was an individual, partnership, or corporation.[2] By applying to all creditors regardless of legal status, the rule promotes certainty and ease of administration since states need go no further than the records of the debtor corporation to determine which state has the power to escheat the unclaimed property.

If the creditor's address "does not appear on the debtor's books or is in a State that does not provide for escheat of intangibles, then the State of the debtor's incorporation may take custody of the funds 'until some other State comes forward with proof that it has a superior right to escheat.' " *Pennsylvania v. New York*, 407 U.S. at 210-11 (quoting *Texas*, 379 U.S. at 582). The state in which the debtor is incorporated has the burden of establishing as to all escheatable items the absence from the debtor's records of an address for the creditor. 407 U.S. at 213.

2. **The overpayments abandoned by creditor brokers with New York addresses**

The abandoned property which Delaware claims consists mainly of dividend and interest overpayments owed by one broker ("debtor

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[2] In *Texas*, the creditors included many partnerships, companies, and corporations as well as individuals. *See* Copy of Report of the Sun Oil Company to the State of Texas.

broker") to another broker or bank ("creditor broker"). They are not owed to the customers (beneficial owners) of creditor brokers, as Delaware suggests, see proposed complaint at 4, 6-7, because the customers have been fully satisfied by creditor brokers and, therefore, have no right to claim these overpayments. The majority of these creditor brokers have trading addresses in New York, only a few have trading addresses in Delaware.[3]

a. How overpayments arise

The overpayments were made by corporate paying agents of securities issuers to debtor brokers, which held the underlying securities in their own name for their customers (the beneficial owners). The debtor brokers then sold the securities to creditor brokers before the record date.[4] The creditor brokers purchased the securities for their own customers but did not register the certificates before the record date. The creditor brokers have failed to claim the overpayments when the brokers attempted to reconcile their accounts. The debtor brokers left holding the overpayments owed to the creditor brokers have turned over this abandoned property to New York.

Generally, a broker holds securities for its customers in its own name. As of the record date for each security, the broker generates a position sheet or worksheet. This report reflects all of the broker's customer accounts entitled to the dividend payment for that security and the actual amount due each account based on the issuer's

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[3] Many of the creditors which have chosen not to pursue their claims to the abandoned property at issue are banks, a large number of which are located in New York. Unless otherwise indicated, the discussion which follows concerning how brokers treat overpayments applies equally to banks.

Not all the entities listed at page 3 of the proposed complaint are debtor brokers incorporated in Delaware. The First Boston Corporation is a debtor broker which has been a Massachusetts corporation since 1932. It is owned by a holding company, First Boston Inc., which is incorporated in Delaware.

[4] On the record date for a particular dividend period, the issuer of a security determines the identity of each of its shareholders so that it knows who is entitled to dividends or other distributions for that period. The actual distribution takes place later, on the payable date, often after the underlying security has been sold.

dividend rate. At the payable date, the broker credits each customer's account for the dividend payment payable to each, and sets up a receivable position for the total amount, pending payment from the issuer's paying agent.[5] The customer, usually being fully satisfied on the payable date, is unaware of the transactions between his broker and other brokers and usually never learns of any discrepancies in their accounts with each other.

The corporate paying agent, which usually is a banking institution acting on behalf of the issuer, will also generate a position sheet as of the record date of all shareholders who according to its records are entitled to dividends and will issue dividend checks dated as of the payable date to the broker holding the securities in its own name. The paying agent does not know if the broker is trading for its own account or on behalf of its customers.

When the amount expected to be received by a broker on the payable date equals the amount actually received from the paying agent, no problems arise. This, however, is not always the case. Often brokers are either overpaid or underpaid by the paying agents because of differences between the position sheets of the brokers and the paying agents.

A dividend overpayment can occur as follows. Customer X (a beneficial owner) has a portfolio of 100 shares of IBM with Broker A. Customer X sells the 100 shares before the record date. As of the record date, Broker A generates a position sheet for all its customers with shares of IBM which does not include Customer X because it knows that this customer sold the 100 shares before the record date and, therefore, is not entitled to any dividends.[6]

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[5] For a more detailed explanation of the mechanics of accounting for dividend distribution by brokers, see Committee on Stockbrokerage Auditing, American Institute of Certified Public Accountants, *Audits of Brokers and Dealers in Securities* 27-29 (1973). New York has lodged a copy of this publication with the Clerk.

[6] It usually takes several business days to transfer the stock after a sale. As a result, the securities industry has established an ex-dividend date, usually four days before the record date. On that date, the stock goes ex-dividend, which means it is sold without a dividend at a discount equal to the dividend. New York Institute of Finance, *Introduction to Brokerage Operations Department Procedures* 129-30 (1979). New York has lodged a copy of this publication with the Clerk. The only

(Footnote continued)

Customer Y, who has a portfolio with Broker B, purchased the shares (as a beneficial owner) sold by Customer X. Broker B, however, did not register the shares in its name in time for the paying agent to adjust its records to reflect the change in ownership as of the record date. As a result, the paying agent issued a dividend check to Broker A for the 100 shares sold by Customer X and Broker A has an overpayment. This overpayment is maintained by Broker A in an accounts payable or unclaimed dividend account.

If Broker A kept a record of each purchase and sale between the record dates, the broker could not only anticipate the overpayment, but also identify which customer caused the overpayment (or any underpayment). Once Broker A identifies this customer, the broker should be able to identify who purchased the shares from that customer.

An underpayment is the reverse of the above. Broker B knows that its Customer Y purchased the 100 shares of IBM before the record date and credited Customer Y's account for the dividend on the payable date. Since the purchase was not reflected on a timely basis on the books of the corporate paying agent, Broker A was overpaid and Broker B was underpaid. Customer Y, however, is entirely unaffected by the underpayment because Broker B has credited its customer's account.

Normally, brokers attempt to reconcile their accounts. Broker B determines who the last registered owner of the 100 shares of IBM was and sends in a claim requesting payment. If the claim was in order, Broker A would honor it and send a check to Broker B, thus, eliminating Broker A's overpayment and offsetting Broker B's underpayment.

This, however, is not always the case. The volume of purchases and sales which take place each day is enormous. Brokers are not always able or willing to expend the time and effort needed to research receivable positions and process claims against other brokers. Therefore, in the above example, if the amount of the

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effect on the above description is that when the stock is sold ex-dividend, the relevant date to determine whether the customer is entitled to a dividend is a few days earlier than the record date. For the sake of simplicity, the discussion uses the record date.

overpayment to Broker A and underpayment to Broker B is small in comparison to the cost of determining which of Broker A's customers sold the shares to which of Broker B's customers, Broker B (the creditor broker) may decide not to pursue the claim to the overpayment held by Broker A (the debtor broker). It is these funds unclaimed by creditor brokers and held by debtor brokers until paid or delivered to the State of New York which Delaware seeks to obtain in this original action.

b. **Proportion of New York, Delaware, and unknown creditors**

Based upon examinations of representative samples of the books and records of debtor brokers, it appears that a significant number of creditor brokers have New York trading addresses and only a few have Delaware trading addresses.[7] For example, one recent limited examination of a representative sample at a typical securities debtor broker failed to disclose *any* sales and possible unclaimed overpayments owed to creditor brokers with non-New York addresses. Another examination at one of the few institutional debtor brokers which conduct business predominantly with brokers located outside New York indicates that the amount of overpayments owed to creditor brokers with New York addresses is likely to be substantial. *See* affidavit of Robert Griffin, Director of Audits, Office of Unclaimed Funds, Office of the Comptroller of the State of New York, dated May 5, 1988 ("Griffin Affidavit") (attached as Exhibit A), at A-1.[8]

These findings are consistent with the structure of the brokerage industry. Few, if any, of the participants in the National Securities Clearing Corporation, a group which includes almost all of the creditor brokers, have Delaware trading addresses. In addition, eighty-four percent of the top 100 creditor brokers ranked by the Securities Industry Association hold 93.6 percent of the total capital

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[7] The address shown on the debtor's records is the broker's trading address at which it transacts brokerage business with the debtor broker, not the state in which the creditor broker is incorporated.

[8] "A " indicates pages in the printed version of the exhibits attached as an addendum to this brief.

held by all creditor brokers and have trading addresses located in New York; none have Delaware trading addresses.[9]

d. **Reconstruction of overpayment transactions**

In some cases, the position sheets and correspondence between debtor and creditor brokers concerning overpayments are readily available. In those cases, it is possible to determine with respect to most unclaimed overpayments which creditor broker has neglected to claim them. In many cases, however, the methods used to keep those records at the debtor broker are inadequate. In those cases, although it would be possible to reconstruct most of the transactions, the cost and time to do so would be very high. The New York State Comptroller has estimated that it would take 36 of its people working full-time for one year to determine the amounts unclaimed by all the creditor brokers for any one year. *See* Griffin Affidavit at A-5. Thus, although the names and addresses of the creditor brokers appear on the debtor brokers' records and it is feasible to determine the addresses of most of the creditors, generally, neither the debtor brokers nor the State of New York has considered it cost effective in the past to reconstruct these transactions where a significant number of the creditor brokers have New York addresses.

3. **Custody of overpayments abandoned by creditor brokers**

New York's current Abandoned Property Law is the product of a general codification in 1943 of then existing law. In adopting it, the Legislature declared that it was "the policy of the state, while protecting the interest of the owners thereof, to utilize escheated lands and unclaimed property for the benefit of all the people of the state." N.Y. Aband. Prop. Law § 102 (McKinney Supp. 1988). Thus, the policy of the state is custodial protection, not confiscation. *Connecticut Mutual Life Ins. Co. v. Moore*, 297 N.Y. 1, 8, 74 N.E.2d 24, 26 (1947), *aff'd*, 333 U.S. 541 (1948); *see also Moufang v. State of New York*, 295 N.Y. 121, 127-28, 65 N.E.2d 321, 323 (1946).

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[9] *See* Securities Industry Association, *Securities Industry Yearbook 1987-88*, at 10-12 (1987); *The E-Z Telephone Directory of Brokers and Banks* (1986) (listing trading addresses).

The Comptroller carries out this custodial responsibility by such steps as maintaining public records of all names and last known addresses of persons appearing to be entitled to abandoned property paid to the State, N.Y. Aband. Prop. Law § 1401 (McKinney 1944), publishing annual reports of property abandoned in the preceding year, N.Y. Aband. Prop. Law § 1402 (McKinney Supp. 1988), assuming liability for payment of claims to abandoned property (see discussion in following section of claims procedure), N.Y. Aband. Prop. § 1404 (McKinney Supp. 1988), and agreeing to hold harmless persons delivering abandoned property to the Comptroller. *Id.* In addition, the Comptroller attempts to locate the true owners of abandoned property through an extensive Outreach Program, including television and radio public service announcements, site visits, direct mailings, posters, and a toll-free number. Office of Unclaimed Funds, New York Comptroller, *Handbook for Reporters of Unclaimed Funds* 30 (2d ed. 1988) ("*Handbook for Reporters of Unclaimed Funds*").[10] In fiscal year 1986 alone, the Comptroller paid over 40,000 claims. *Id.*

Since 1952, the Abandoned Property Law has included provisions specifically applying to unclaimed property held by securities brokers or dealers.[11] N.Y. Aband. Prop. Law §§ 510-14 (McKinney Supp. 1988) (article V-A). Any dividends, profits, or other

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[10] The excerpts from the *Handbook for Reporters of Unclaimed Funds* attached to the plaintiff's brief are from the first edition and are out of date. New York has lodged a copy of the current version of the *Handbook* with the Clerk.

[11] Section 510 defines brokers and dealers as follows:

> 4. "Broker" shall include any individual or corporation engaging in this state in the purchase, sale or exchange of securities for or on behalf of any customer but shall not include a banking organization as defined in section one hundred three of this chapter.
>
> 5. "Dealer" shall include any individual or corporation engaging in this state as a regular business in the purchase, sale or exchange of securities for his or its own account, through a broker or otherwise, but shall not include a banking organization as defined in section one hundred three of this chapter.

N.Y. Aband. Prop. Law §§ 510(4), (5) (McKinney Supp. 1988).

distributions, paid in stock or cash, and any interest or other payment or principal held by brokers or dealers which remain unclaimed for three years are deemed abandoned property. N.Y. Aband. Prop. Law §§ 510(7), 511 (McKinney Supp. 1988). Each year on March 10, brokers and dealers must deliver to the Comptroller all property which on December 31 of the previous year was deemed abandoned property under section 511 (except for property which has ceased to be abandoned). N.Y. Aband. Prop. Law § 512(1) (McKinney Supp. 1988). Payments and deliveries of abandoned property under section 512 must be accompanied by a report including certain required information such as the name and last known address of the customer entitled to the abandoned property. N.Y. Aband. Prop. Law §§ 513(2)(a), (3)(c) (McKinney Supp. 1988); *Handbook for Reporters*, at 10. Brokers and dealers are obligated to retain books and records relating to such abandoned property for eight years. N.Y. Aband. Prop. Law § 513-a (McKinney Supp. 1988).[a]

4. **The New York claims procedure for abandoned property used by other states**

Under the New York Abandoned Property Law, a state may make a claim for abandoned property in the custody of the Comptroller by making a claim directly under section 1406(1) with the Comptroller and seeking administrative and judicial review of any adverse determination. A state may also enter into a reciprocity agreement pursuant to section 1417, under which the states agree to deliver on an annual basis the unclaimed property owing to the residents of the other.

Section 1406(1) provides that a "[c]laim may be filed with the state comptroller for any abandoned property amounting to over

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[a] The Legislature adopted this recordkeeping requirement after finding in 1973

> that very special and difficult problems came upon the securities industry during a prolonged period of unanticipated and extremely heavy volume of securities transactions as a result of which various basic records maintained by numerous securities brokers and dealers became inaccurate and unreliable, which condition in turn, caused industry wide record keeping problems.

Act of Jan. 1, 1973, ch. 617, § 1, 1973 N.Y. Laws 1124.

three dollars heretofore paid to the state or hereafter paid or delivered to the state comptroller pursuant to this chapter[.]" N.Y. Aband. Prop. Law § 1406(1)(a) (McKinney Supp. 1988).

This section provides the claimant with full due process protections. The Comptroller possesses "full and complete authority to determine all such claims" and must "forthwith send written notice of such determination to the claimant." N.Y. Aband. Prop. Law § 1406(1)(b) (McKinney Supp. 1988). The claimant "may apply for a hearing and redetermination of his claim" within four months. *Id.* In addition, the Comptroller has provided by regulation for such hearings at which the claimant has the right to be represented by counsel, summon and cross-examine witnesses, and submit legal memoranda. N.Y. Aband. Prop. Law §§ 1406(1)(b), (c) (McKinney 1944 & Supp. 1988); N.Y. Comp. Codes R. & Regs. tit. 2, § 119 (1986). Upon completion of the hearing, the hearing officer must render a decision on the merits, which is subject to judicial review in a special proceeding if the claimant makes an application to the Supreme Court, Albany County, within four months after the decision is mailed. N.Y. Aband. Prop. Law § 1406(1)(b) (McKinney Supp. 1988); N.Y. Comp. Codes R. & Regs. tit. 2, § 119.9 (1986). *See also* N.Y. Civ. Prac. L. & R. § 7801 *et seq.* (McKinney 1981 & Supp. 1988).

Sister states have presented claims for abandoned property directly to the Comptroller under section 1406(1). In recent years, for example, Alaska, Maine, Massachusetts, North Carolina, Texas, Utah, and Virginia have all made such claims. Affidavit of Herbert M. Friedman, dated April 29, 1988 (attached as Exhibit B), at A-18. In the only case in which New York denied a claim, the claimant state elected not to seek further administrative or judicial review. *Id.*

Last year, New York began entering into prospective reciprocity agreements with other states under section 1417 of the Abandoned Property Law.[13] N.Y. Aband. Prop. Law § 1417 (McKinney Supp. 1988). Griffin Affidavit, at A-6. New York has entered into such agreements with Idaho, Massachusetts, Minnesota, North Carolina, North Dakota, Virginia, and Wisconsin and at least ten other states

[13] The bill which ultimately became section 1417 was introduced at the request of the Comptroller. Report to the Governor on Legislation by Louis R. Tomson, Counsel to the Comptroller, dated May 30, 1985.

(not including Delaware) are considering signing such agreements. *Id.* at A-6. Under these agreements, each state agrees that abandoned property in its custody is subject to claims by the true owner at any time, that it will review its annual abandoned property reports to locate property unclaimed by persons or entities whose last known addresses are in the other state, and that it will deliver on an annual basis unclaimed property owed to residents of the other state. A typical reciprocity agreement is attached as Exhibit V to the Griffin Affidavit, at A-14. Each of the states which are parties to these reciprocity agreements deliver unclaimed property owed to individuals and corporations whose last known address is located in the other state. Griffin Affidavit, at A-6.

New York is an active member of the Reciprocal Auditing Task Force ("Task Force") of the National Association of Unclaimed Property Administrators ("NAUPA") along with 26 other states (not including Delaware) which cooperate in obtaining unclaimed property abandoned by each other's residents. *Id.* at A-7. The Director of Audits is the project coordinator of a major effort by the Task Force to gather information on the abandoned property laws of the participating states. *Id.* at A-7. As part of this effort, he sent a questionaire to all 49 other states on March 30, 1988. He has not yet heard from Delaware. *Id.* at A-7. In addition, the Director of Audits has repeatedly invited all states at NAUPA conferences to enter into reciprocity agreements with New York. Delaware has not responded to these invitations. *Id.* at A-7.

Delaware failed to make a claim upon New York for the funds sought here, to enter into a reciprocity agreement, or to attempt to reach a negotiated solution before instituting this original action.

SUMMARY OF ARGUMENT

This case does not belong in this Court. Under *Texas v. New Jersey*, 379 U.S. 674 (1965), and *Pennsylvania v. New York*, 407 U.S. 206 (1972), which Delaware recognizes as the governing law, the state of the creditor's last known address, as shown on the records of debtor corporation holding the abandoned property, is entitled to escheat the property and, if the address of the creditor cannot be determined by examining the debtor's records, the state in which the debtor is incorporated is entitled to escheat the property. The

only issue here is factual. The case does not raise a question which implicates serious concerns of federalism. Adequate alternative forums are available to resolve these factual questions and accepting jurisdiction will overburden this Court's already overcrowded docket.

New York has taken custody of unclaimed dividend and interest overpayments owed by debtor brokers to creditor brokers. Most of these abandoned funds are not owed to the creditor brokers' customers, who should have been fully satisfied in the ordinary course of business. The Comptroller has determined that a large number of the creditor brokers which have abandoned these overpayments have New York addresses and only a few have Delaware addresses.

Thus, the only issue which this Court would have to resolve if it were to take the case is the factual question whether any of the creditor brokers have Delaware addresses or unknown addresses. It is possible, but not practicable, to reconstruct most overpayment transactions, but by employing a sampling technique analogous to the use of a formula approved in *Pennsylvania*, where the cost of reconstructing every transaction was not cost effective, it can be determined which state is entitled to custody of abandoned property.

Alternative forums are available for resolving these factual questions. This Court's decisions demonstrate that Delaware or its State Escheator could pursue the claims for property abandoned by creditor brokers with Delaware addresses or with unknown addresses in state administrative proceedings, with subsequent state court review, or in federal district court.

Moreover, Delaware's failure for 17 years to employ New York's claim procedure, in contrast to other states, or to attempt to negotiate with New York before bringing this original action, demonstrates that the case is not ripe for decision by this Court. Even if Delaware or its Escheator were to present these claims to the Comptroller and exhaust the administrative review procedures, the only issue remaining would be factual—whether New York correctly determined that the address of the creditor broker was located in New York, in Delaware or was unknown. This is not an appropriate issue for this Court.

ARGUMENT

I. THIS CASE IS NOT RIPE UNTIL DELAWARE HAS EMPLOYED THE NEW YORK CLAIMS PROCEDURE USED BY OTHER STATES

This case will not be ripe until Delaware files claims for overpayments abandoned by creditor brokers with the Comptroller under section 1406(1) of the Abandoned Property Law and the Comptroller denies those claims. Delaware has yet to file such a claim, much less receive a denial. Until then, there is no final administrative action which will be judicially reviewable and the entire case is predicated on highly speculative events which may never occur. In addition, until Delaware develops the factual issues further by formulating and presenting a claim and the Comptroller denies a claim, the case is not fit for judicial determination. Moreover, Delaware, which has never presented such a claim in the 17 years its Escheat Law has been in effect, will not suffer any hardship by presenting its claims to abandoned property first to the Comptroller.

The doctrine of ripeness, which is predicated both on article III requirements of a case or controversy and prudential concerns of judicial economy, *see, e.g., Blanchette v. Connecticut General Insurance Corps.*, 419 U.S. 102, 138 (1974) (Regional Rail Reorganization Cases), has special force in original actions. *Alabama v. Arizona*, 291 U.S. 286, 292 (1934) (leave to file an original complaint "will not be granted unless the threatened injury is clearly shown to be of serious magnitude and imminent"). Indeed, the burden on the state "fully and clearly to establish all essential elements of its case is greater than that generally required to be borne by one seeking an injunction in a suit between private parties." *Id.* As shown below, Delaware fails to meet this high standard.

"[R]ipeness is peculiarly a question of timing." *Blanchette*, 419 U.S. at 140. The "basic rationale" of the doctrine "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967). Therefore, a claim is not ripe if it involves " 'contingent future events that may not occur as anticipated, or indeed may not occur at all.' " *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 580-81 (1985) (quoting

13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3532 (1984)). Until an agency has made a final determination, administrative action is not judicially reviewable. *Pennell v. City of San Jose*, 108 S. Ct. 849, 856-57 (1988) (taking, due process, and equal protection challenges to rent control ordinances premature in absence of showing that city officials had applied them to plaintiffs); *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 192 (1985) (developer's taking challenge to zoning regulation not ripe absent final decision by zoning commission and in light of failure to seek compensation through state claims procedures; due process challenge to regulation not ripe until final decision on application to the property);[14] *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 297 (1981) (taking challenge to reclamation statute premature because property owners had not identified any property taken by enactment of that statute nor sought administrative relief); *Hodel v. Indiana*, 452 U.S. 314, 335 n.20 (1981) (due process challenge to reclamation statute's civil penalty provisions premature where plaintiffs failed to show they were ever assessed penalties or suffered any injury); *Agins v. Tiburon*, 447 U.S. 255, 260 (1980); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 136-37 (1978).

Both " 'the fitness of the issues for judicial decision' and 'the hardship to the parties of withholding court consideration' must inform any analysis of ripeness." *Thomas*, 473 U.S. at 581 (quoting *Abbott*

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[14] In *Williamson*, this Court explained the distinction between ripeness and exhaustion:

> The question whether administrative remedies must be exhausted is conceptually distinct, however, from the question whether an administrative action must be final before it is judicially reviewable. While the policies underlying the two concepts often overlap, the finality requirement is concerned with whether the initial decision maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate.

473 U.S. at 192-93 (citations omitted).

Laboratories, 387 U.S. at 149).[15] Until the facts are determined, challenge to administrative action is not fit for judicial review when the questions are primarily factual rather than legal. *See Thomas*, 473 U.S. at 581; *Pacific Gas and Electric Company v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190 (1983) (finding ripe the predominantly legal question of preemption of state waste disposal regulations, but not ripe the constitutionality of interim storage regulations which required further factual development). When "postponement of [a] decision would likely work substantial hardship" on the plaintiff, this will militate in favor of finding that the case is ripe. *Pacific Gas and Electric Company*, 461 U.S. at 201-02 (expenditure of millions of dollars over a number of years in building power plants which might never be certified).

These principles demonstrate that Delaware's claim is not ripe. First, until the Comptroller denies a claim by Delaware, there is no final agency action. Second, until there is *some* factual development, the case is not fit for judicial resolution. This has particular force here because Delaware has sought to invoke this Court's original jurisdiction based upon a fundamental misunderstanding about the facts. It has alleged that the abandoned property in the custody of the Comptroller pursuant to article V-A consists of overpayments "as to which the brokers have no identification or last known address of anyone claiming to be the beneficial owner of such property." Proposed complaint, ¶ 3. The identity of the beneficial owners is irrelevant since the overpayments are owed to

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[15] This Court has treated cases as not ripe and deferred consideration of jurisdictional issues in another original action when state courts could resolve state law issues which might make exercise of its original jurisdiction unnecessary. *See Arkansas v. Texas*, 346 U.S. 368 (1953) (deferring consideration in original action pending outcome of state litigation). *See also Herb v. Pitcairn*, 324 U.S. 117, 128 (1945) (deferring consideration to permit parties to determine in state court whether decision rested on adequate and independent state ground).

The same factors support deferring consideration of jurisdictional issues here as in *Arkansas v. Texas* even though no state court litigation is pending. The critical factor in that case was not that another proceeding was pending but that if the proceeding in the other forum were to resolve "the whole controversy, leaving no federal questions, there will be no occasion for us to proceed further." *Arkansas v. Texas*, 346 U.S. at 371. Similarly, a favorable determination on any of Delaware's claims would make exercise of original jurisdiction unnecessary.

the creditor brokers, not their customers. Moreover, examinations of representative samples of debtor broker records have indicated that many of the addresses of creditor brokers which have abandoned overpayments can be determined and that few of these creditor brokers have Delaware addresses. Indeed, the only questions presented are entirely factual. Finally, Delaware could not even suggest that deferring court consideration until it presented a claim and the Comptroller made a final determination would cause it undue hardship since it has never made a claim and does not allege that it ever instituted escheat proceedings for any of this property.

Unless this Court denies Delaware's motion for leave to file, every time a state contends that another state took custody of abandoned property based on a factual error the claimant state will be entitled to bring an original action in this Court—no matter what size the claim may be—without first making a claim and permitting the state with custody an opportunity to determine the facts and correct any possible error. Indeed, the claimant state could invoke this Court's original jurisdiction even if the state with custody routinely paid all valid claims by other states which satisfied the rule in *Texas* and *Pennsylvania*.

II. DELAWARE HAS FAILED TO EXHAUST NEW YORK'S PROCEDURE FOR REVIEWING CLAIM DETERMINATIONS

New York has an administrative procedure for reviewing and redetermining claim determinations made by the Comptroller which could grant Delaware full relief on its claims. N.Y. Aband. Prop. Law §§ 1406(1)(b), (c) (McKinney 1944 & Supp. 1988); N.Y. Comp. Codes R. & Regs. tit. 2, § 119 (1986). As shown below, requiring Delaware to employ these review and redetermination fair hearing procedures will further many of the most important purposes of the exhaustion doctrine by developing the necessary factual background for judicial decision and by avoiding any need for the Court to act if Delaware's claims are granted, thus, conserving this Court's resources for its primary role as an appellate court. Moreover, none of the factors which courts consider in refusing to require exhaustion apply here.

A party normally is not entitled to judicial relief for an injury until available administrative remedies have been exhausted. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938). In that case, this Court explained:

> [T]he long settled rule of judicial administration [is] that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.

Id. (footnote omitted). This rule applies in federal courts to state and federal remedies and has special force when state administrative remedies are involved. *Illinois Commerce Commission v. Thompson*, 318 U.S. 675, 686 (1943); *Natural Gas Pipeline Co. v. Slattery*, 302 U.S. 300, 310-11 (1937); *Gilchrist v. Interborough Rapid Transit Co.*, 279 U.S. 159, 208-09 (1929). *See also* C. Wright, *The Law of Federal Courts* 293 (1983) (the rationale for requiring exhaustion of state administrative remedies is that "until the administrative process is complete, it cannot be certain that the party will need judicial relief"). As this Court explained in *Public Service Commission v. Wycoff Co.*, 344 U.S. 237 (1952):

> Even when there is no incipient federal-state conflict, the declaratory judgment procedure will not be used to preempt and prejudge issues that are committed for initial decision to an administrative body or special tribunal any more than it will be used as a substitute for statutory methods of review.
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> * * *
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> State administrative bodies have the initial right to reduce the general policies of state regulatory statutes into concrete orders and the primary right to take evidence and make findings of fact.

344 U.S. at 246-47.

Requiring Delaware to make a claim and, if the Comptroller were to deny all or part of the claim, to invoke New York's review and redetermination procedure, would further many of the important purposes of the doctrine requiring exhaustion of administrative proceedings as set forth in *McKart v. United States*,

395 U.S. 185, 193-95 (1969): (1) to avoid premature interruption of the administrative process; (2) to enable the agency to develop the necessary factual background upon which the decisions should be based; (3) to permit the agency to exercise its discretion or apply its expertise; (4) to improve the efficiency of the administrative process; (5) to conserve scarce judicial resources, since the complaining party may be successful in vindicating rights in the administrative process and the courts may never have to intervene; (6) to give the agency a chance to discover and correct its own errors; and (7) to avoid the possibility that "frequent and deliberate flouting of administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures." For example, the administrative process would provide an appropriate forum for Delaware to demonstrate that the address of an abandoning creditor broker does not appear on the records of the debtor or that those records show that the creditor broker's listed address is in Delaware. Exhaustion conserves this Court's scarce resources for its "paramount role as the supreme federal appellate court," *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 505 (1971), both by permitting such factual development and by making unnecessary any judicial review if Delaware establishes its claims.

None of the countervailing factors counsel against exhaustion such as

> irreparable injury to a party from pursuing the adminstrative remedy, clear absence of agency jurisdiction, clear illegality of the agency's position, a dispositive question of law peculiarly within judicial competence, the futility of exhaustion, and expense and awkwardness of the administrative proceeding as compared with inexpensive and efficient judicial disposition of the controversy.

4 K. Davis, *Adminstrative Law Treatise* § 26:1 at 414-15 (2d ed. 1983). Here, there is no danger of an irreparable injury. The dispute is simply about a claim to money which Delaware has never asserted since its escheat statute went into effect in 1971. The Abandoned Property Law and implementing regulations expressly provide that the Comptroller has jurisdiction to review and determine claims to abandoned property in the custody of the Comptroller. This informal hearing procedure is less awkward and far less expensive than an original action.

III. THIS COURT SHOULD DECLINE TO EXERCISE ORIGINAL JURISDICTION BECAUSE THE CASE INVOLVES SOLELY FACTUAL QUESTIONS

This Court will exercise original jurisdiction only when strictly necessary. Thus, it will decline to exercise its exclusive original jurisdiction when adequate alternative forums exist in which the states can raise the same issues, and when the case involves largely questions of fact which do not implicate serious concerns of federalism. Here, Delaware, by failing to make a claim or even to attempt to reach a mutual accomodation with New York before instituting suit, has failed to show that invoking this Court's jurisdiction is absolutely necessary. Even more importantly, this case does not implicate serious concerns of federalism. It raises only factual questions in the application of straightforward rules of law, which can be fully addressed in alternative forums. This Court should, therefore, decline to exercise original jurisdiction in this case and remit the parties to one of those forums.

A. Absent any effort by Delaware to seek a mutual accomodation, this Court should decline to exercise jurisdiction

Delaware failed to contact New York to see if this matter could be resolved without instituting this original action. Simultaneously with the filing of this brief, New York has written directly to Delaware suggesting that the two states negotiate in good faith to resolve this matter and, thus, avoid further litigation in this Court.[*] Under the rules set forth in *Texas v. New Jersey*, 379 U.S. 674 (1965), and *Pennsylvania v. New York*, 407 U.S. 206 (1972), Delaware would be entitled to any property abandoned by creditor brokers with Delaware addresses or abandoned by creditors whose addresses cannot be determined if held by debtor brokers incorporated in Delaware.

This Court has repeatedly emphasized that many disputes between states would be better handled by negotiations and interstate compacts. For example, the Court has declared:

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[*] New York has lodged with the Clerk a copy of a letter, dated May 9, 1988, from the Attorney General of the State of New York to the Attorney General of Delaware.

> We cannot withhold the suggestion, inspired by the consideration of this case, that the grave problem of sewage disposal presented by the large and growing populations living on the shores of New York Bay is one more likely to be wisely solved by cooperative study and by conference and mutual concession on the part of representatives of the States so vitally interested in it than by proceedings in any court however constituted.

New York v. New Jersey, 256 U.S. 296, 313 (1921). *See also Texas v. New Mexico*, 462 U.S. 554, 567 n.13 (1983); *Vermont v. New York*, 417 U.S. 270, 274 (1974) (per curiam); *State ex rel. Dyer v. Sims*, 341 U.S. 22, 27 (1951); *Colorado v. Kansas*, 320 U.S. 383, 392 (1943); *Minnesota v. Wisconsin*, 252 U.S. 273, 283 (1919); *Washington v. Oregon*, 214 U.S. 205, 218 (1909). In *Colorado v. Kansas*, this Court cautioned states about invoking original jurisdiction as a means of settling interstate conflicts, declaring that, despite having jurisdiction over such disputes, "mutual accommodation and agreement should, if possible be the medium of settlement instead of invocation of our adjudicatory power." *Id.* at 392. *See also Nebraska v. Wyoming* 325 U.S. 589, 616 (1945).

In at least two cases, the availability of a negotiated solution appears to have been a consideration in declining to exercise original jurisdiction. In *Louisiana v. Texas*, 176 U.S. 1 (1900), the Court found the absence of a controversy between the two states. It declared that "it is difficult to conceive of a direct issue between two states in respect of a matter where no effort at accommodation has been made." *Id.* at 18. In *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971), the Court also declined to exercise its jurisdiction over a case in which it found that

> granting Ohio's motion for leave to file would, in effect commit this Court's resources to the task of trying to settle a small piece of a much larger problem that many competent adjudicatory and *conciliatory bodies* are actively grappling with on a more practical basis.

401 U.S. at 503 (emphasis supplied).

In contrast, this Court is more likely to exercise its jurisdiction when genuine efforts at settlement have failed. *Idaho ex rel. Evans*

v. Oregon, 444 U.S. 380, 386 (1980) (declining to dismiss original action by Idaho against Oregon and Washington where they "had consistently rebuffed Idaho's attempts to join the Columbia River Fish Compact or to otherwise negotiate some sort of accommodation"); *Nebraska v. Wyoming*, 325 U.S. 589, 616 (1945) (proceeding to consider special master's report in case pending for eleven years when efforts at settlement failed). In light of the above, this Court should defer consideration of jurisdiction until the parties have had an opportunity to reach a negotiated solution.

B. This Court declines to exercise original jurisdiction when the case presents largely factual, rather than serious federal, questions

Article III, section 2 of the Constitution defines this Court's original jurisdiction:

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction.

This means that in cases "in which a State shall be Party," cases and controversies can be brought directly in this Court without first filing in a lower court (provided that the judicial power of the United States encompasses the dispute).[17]

Congress has defined the Court's exclusive original jurisdiction by statute:

> The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.

28 U.S.C. § 1251(a) (1982). Despite the express statement that the Supreme Court has "exclusive jurisdiction of all controversies between two or more States," this Court has consistently interpreted its original jurisdiction in *all* cases as discretionary. It has explained:

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[17] As shown above in Point I, because this case is not yet ripe, this Court lacks jurisdiction.

> In recent years, we have consistently interpreted 28 U.S.C. § 1251(a) as providing us with substantial discretion to make case-by-case judgments as to the practical necessity of an original forum in this Court for particular disputes within our original jurisdiction. We exercise that discretion with an eye to promoting the most effective functioning of this Court within the overall federal system.

Texas v. New Mexico, 462 U.S. 554, 570 (1983) (citations omitted). *Accord California v. West Virginia*, 454 U.S. 1027 (1981) (declining to exercise exclusive jurisdiction over suit by one state university against another for breach of contract covering athletic games); *Maryland v. Louisiana*, 451 U.S. 725, 739 (1981) (deciding that original action within exclusive jurisdiction was appropriate). The Court has stated that this original jurisdiction should be "invoked sparingly," *Utah v. United States*, 394 U.S. 89, 95 (1969) (per curiam), and when "justified only by the strictest necessity." *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. at 505.

This Court considers several factors in determining whether to exercise its exclusive original jurisdiction such as the seriousness of the federal questions presented, the complexity of the factual questions, the availability of an adequate alternative forum, and the impact the case will have on its primary role as an appellate court. As demonstrated below, each of these factors mandate declining exercise of jurisdiction here. The Court has explained:

> We have imposed prudential and equitable limitations upon the exercise of our original jurisdiction. As we explained in *Illinois v. City of Milwaukee*, 406 U.S. 91, 93-94 (1972):
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> "We construe 28 U.S.C. § 1251(a)(1), as we do Art. III, § 2, cl. 2, to honor our original jurisdiction but to make it obligatory only in appropriate cases. And the question of what is appropriate concerns, of course, the seriousness and dignity of the claim; yet beyond that it necessarily involves the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had. We incline to a sparing use of our original jurisdiction so that our increasing duties with the appellate docket will not suffer."

California v. Texas, 457 U.S. 164, 168 (1982) (per curiam) (determining that exercise of exclusive jurisdiction was appropriate). In deciding whether the claim is of sufficient "seriousness and dignity," the Court will consider whether it "sufficiently implicate[s] the unique concerns of federalism" which form the basis of its original jurisdiction. *Maryland v. Louisiana*, 451 U.S. 725, 743 (1981).

If the case is extraordinarily complex or would involve extensive factfinding, the Court may decline to take the case. *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. at 504-05. In the *Ohio* case, Justice Harlan explained as this Court declined to exercise its jurisdiction over a matter which did not involve "difficult or important problems of federal law," *id.* at 504, that it

> found even the simplest sort of interstate pollution case an extremely awkward vehicle to manage. And this case is an extraordinarily complex one both because of the novel scientific issues of fact inherent in it and the multiplicity of governmental agencies already involved. Its successful resolution would require primarily skills of factfinding, conciliation, detailed coordination with — and perhaps not infrequent deference to — other adjudicatory bodies, and close supervision of the technical performance of local industries. We have no claim to such expertise or reason to believe that, were we to adjudicate this case, and others like it, we would not have to reduce drastically our attention to those controversies for which this Court is a proper and necessary forum. Such a serious intrusion on society's interest in our most deliberate and considerate performance of our paramount role as the supreme federal appellate court could, in our view, be justified only by the strictest necessity, and element which is evidently totally lacking in this instance.

Id. at 504-05.

This case does not raise any questions which "sufficiently implicate the unique concerns of federalism" which form the basis of this Court's original jurisdiction. *Maryland v. Louisiana*, 451 U.S. at 743. It involves an application of existing law to a particular set of facts.[8]

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[8] That existing law can be gleaned from *Western Union Co. v. Pennsylvania*, 368 U.S. 71, 79 (1961), *Texas*, and *Pennsylvania*. In each of those cases, this

(Footnote continued)

The only role for this Court would be to apply these rules to factual issues of great complexity more appropriately resolved in another forum. Thus, as in *California v. West Virginia*, 454 U.S. 1027 (1981), a case which involved no federal questions but only a controversy arising out of an alleged breach of contract governing athletic contests between two state universities, exercise of original jurisdiction here is inappropriate.

The only issues to be resolved are factual. As demonstrated above, the task of determining the identities and addresses of the creditor brokers will involve a huge and lengthy factfinding effort.

C. **Adequate alternative forums are available**

This Court has repeatedly declared that "[w]e seek to exercise our original jurisdiction sparingly and are particularly reluctant to take jurisdiction of a suit where the plaintiff has another adequate forum in which to settle his claim." *United States v. Nevada*, 412 U.S. 534, 538 (1973) (per curiam). Delaware can resolve the issues in this case either in administrative claims proceedings, with subsequent review by New York courts of any adverse determinations, or in a federal district court.

Delaware can resolve the issues in this case by invoking the administrative and judicial review procedures New York provides in section 1406(1) should the Comptroller deny any of its claims. This Court has declined to exercise its original jurisdiction when the issues raised by the state seeking to invoke it could be resolved by a state agency or a state court. *Arizona v. New Mexico*, 425 U.S. 794 (1976) (per curiam); *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971); *Louisiana ex rel. Jones v. Bowles*, 322 U.S. 707 (1943) (per

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Court was asked to establish the rule which should apply – a question which sufficiently implicated the unique concerns of federalism forming the basis of the Court's original jurisdiction. In *Western Union*, the court suggested that it might refer future disputes to a federal district court. 368 U.S. at 79-80. In *Texas*, the Court took jurisdiction "*to adopt a rule* which will settle the question of which State will be allowed to escheat this intangible property," 379 U.S. at 677 (emphasis supplied), and in *Pennsylvania*, it addressed attempts to modify the rule. This Court should accept jurisdiction in this case only if it wishes to consider altering the rules established in *Western Union*, *Texas*, and *Pennsylvania*. In that event, New York may wish to advance arguments it believes would be germane to that reconsideration.

curiam) (and cases cited); *Louisiana v. Cummins*, 314 U.S. 580 (1941) (per curiam); *Massachusetts v. Missouri*, 308 U.S. 1 (1939); *Massachusetts v. Mellon*, 262 U.S. 447 (1923); *Oklahoma v. Atchinson, T & S.F.R.R.*, 220 U.S. 277 (1911).

The application of this principle in three relatively recent cases demonstrates that Delaware has adequate alternative forums. In *Arizona v. New Mexico*, Arizona brought an original action in its proprietary capacity as a consumer of electricity and as *parens patriae* for its citizens, to challenge New Mexico's electrical energy tax on any electric utility generating electricity in New Mexico. Arizona sought a declaratory judgment that the tax discriminated against interstate commerce. Three Arizona utilities (one of which was a political subdivision of Arizona) affected by the tax had refused to pay and filed suit jointly in a New Mexico court. The Court held that "[i]n the circumstances of this case, we are persuaded that the pending state-court action provides an appropriate forum in which the *issues* tendered here may be litigated." 425 U.S. at 797 (emphasis in original). It added that if the utilities prevailed, Arizona would be vindicated; if they lost, the issues raised could be brought to the Court by way of a direct appeal under 28 U.S.C. § 1257(2).

In *Ohio v. Wyandotte Chemicals Co.*, Ohio filed a bill of complaint invoking the Court's original jurisdiction against private companies incorporated in Michigan, Delaware, and Canada to abate a nuisance causing pollution of Lake Erie. The Court, in declining jurisdiction, explained that several other forums were available to raise the same issues including state courts, state agencies, Canadian provincial agencies, and an international commission.[19] 401 U.S. at 502-03.

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[19] Similarly, this Court's decision in *Nevada v. Hall*, 440 U.S. 410 (1979), suggests that New York courts could resolve these issues. In *Nevada v. Hall*, this Court held that California courts could render a judgment against Nevada arising out of an automobile collision involving a Nevada state employee driving a state-owned car. Leading commentators argue that

> [t]he logic of that decision presumably would encompass California as a plaintiff if one of its vehicles had been damaged through the fault of the Nevada state employee. It is difficult to suppose Congress meant to allow one state to be sued in the courts of another state when the

(Footnote continued)

As shown below, none of the factors which led this Court in applying these standards in *Maryland v. Louisiana*, 451 U.S. 744 (1981), to conclude that pending state proceedings were inadequate apply here. In that case, several states, joined by the United States and a number of pipeline companies, challenged the constitutionality of Louisiana's first-use tax on certain uses of natural gas brought into that state. This Court denied Louisiana's motion to dismiss, brought on the ground that the constitutional issues could be addressed in certain pending state court actions by Louisiana against the pipeline companies and by the pipeline companies against Louisiana seeking a refund of taxes paid under protest. This Court found five "significant differences" from *Arizona v. New Mexico* which compelled an opposite result. 451 U.S. at 743. First, since one of the three electric companies involved in the state court action in New Mexico was an Arizona political subdivision, that state's interests were actually represented by one of the named parties to the lawsuit. In Maryland, however, none of the plaintiff states were directly represented in the pending proceedings. Second, the Louisiana forum was imperfect, "primarily because no injunctive relief prior to the determination on the merits is possible under Louisiana law." *Id.* at 743 n.19. Third, Arizona had not yet suffered any harm because none of the utilities had paid a tax at the time it moved for leave to file the complaint. Louisiana, however, required payment of the tax during the refund action, plus interest. Fourth, "[t]he tax at issue in the *Arizona* case did not sufficiently implicate the unique concerns of federalism forming the basis of our original jurisdiction." *Id.* at 743. The Louisiana tax did. It affected millions of consumers in over thirty states. Moreover, in contrast to the *Arizona* case, the interests of the United States in administration of the Outer Continental Shelf were directly implicated and a federal district court would be an inadequate forum to address those concerns in the current posture of the case. *Id.* at 744-45.

New York's administrative proceedings and subsequent judicial review fully satisfy the standards in these three cases. Delaware or

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plaintiff was a private citizen, but not when the plaintiff was the forum state itself.

R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 476-77 (6th ed. 1986).

its State Escheator can receive a full and fair administrative hearing under section 1406(1) of the Abandoned Property Law and section 119 of the Department of Audit and Control regulations. In addition, a claimant is entitled to full judicial review of any redetermination after the fair hearing. No obstacles exist to Delaware seeking injunctive relief from the Comptroller during the pendency of administrative proceedings. Delaware would be entitled to seek injunctive relief pending an appeal from an adverse administrative determination pursuant to N.Y. Civ. Prac. L. & R. §§ 6301, 7805 (McKinney 1980 & 1981). *See Tuck v. Heckscher*, 65 Misc. 2d 1059, 320 N.Y.S.2d 419, 37 A.D.2d 558, 323 N.Y.S.2d 659, *aff'd*, 29 N.Y.2d 288, 327 N.Y.S.2d 351, 277 N.E.2d 402 (1971).[20]

Moreover, the case does not implicate the unique concerns of federalism forming the basis of this Court's jurisdiction. In contrast to *Maryland*, which involved a constitutional challenge with an impact on millions of consumers in thirty states and important national interests, this case involves only a factual determinations in the application of simple rules with an impact on only a few states. Indeed, this case involves just the sort of routine dispute which this Court has repeatedly cautioned was inappropriate for resolution

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[20] Delaware is not entitled to a preliminary injunction in any event. It has failed to meet its burden to make a clear showing that it is entitled to this extraordinary and drastic remedy. Under the traditional four-part test, the plaintiff must demonstrate that it will be irreparably harmed, that the balance of hardships tips in its favor, that it is likely to succeed on the merits, and that the public interest would be served. *See, e.g., Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958) (per curiam).

Here, Delaware, which has simply alleged that it would be irreparably harmed, see proposed complaint at 11, could not demonstrate that it will suffer irreparable harm since it waited 17 years to file this original action and since it has an adequate alternative remedy in the form of money damages. The harm to New York, which has relied on this property as a source of revenue for far longer than 17 years, would exceed any conceivable harm to Delaware, which has never made a claim for these funds in 17 years and, apparently, has never instituted escheat proceedings. Indeed, if anything, it would be helped by having New York collect these funds during the course of litigation should it prevail because it is not attempting to do so now. As shown elsewhere, Delaware is not likely to succeed on the merits and the public interest of both states would be served by having New York, the only state which has taken custody of the funds in the past, continue to do so pending the outcome of these proceedings.

in an original action. As Justice Harlan explained, "[c]onsider for example, the frequency with which States and nonresidents clash over the application of state laws concerning taxes, motor vehicles, decedents' estates, business torts, government contracts, and so forth. It would, indeed, be anomalous were this Court to be held out as a principal forum for settling such controversies." *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. at 497. *See also Maryland v. Louisiana*, 451 U.S. at 740 n.14, *Arizona v. New Mexico*, 425 U.S. at 798. It would be equally as anomalous if this Court were held out as the principal forum for resolving factual disputes in the distribution of funds when a perfectly adequate forum exists.

The issues in this case also could be resolved by referring this matter to a federal district court. Indeed, this Court suggested just this possibility in *Western Union Co. v. Pennsylvania*, 368 U.S. 71, 79-80 (1961). There, it declared: "Whether and under what circumstances we will exercise our jurisdiction to hear and decide these controversies [between different states over their right to escheat intangibles] ourselves in particular cases, and whether we might under some circumstances refer them to United States District Courts, we need not now determine." 368 U.S. at 79.[2]

IV. NEW YORK IS ENTITLED TO ALL UNCLAIMED DIVIDENDS ABANDONED BY CREDITOR BROKERS WHICH HAVE NEW YORK ADDRESSES

As Delaware recognizes, for nearly a quarter century the rule governing which state may escheat intangible personal property has been clear. Since intangible property is a debt and a debt is the personal property of the creditor, the state of the creditor's last-known address as shown on the debtor corporation's records (not

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[2] In *dicta*, without citing *Western Union* or any other authority, this Court said in another case that a district court would not have jurisdiction to grant a motion by Idaho to intervene in a suit by Indian Tribes against Oregon and Washington because intervention might convert the suit into a dispute among the states, over which the district court would have no jurisdiction. *Idaho ex rel. Evans v. Oregon*, 444 U.S. 380, 387 (1980). Nothing in that decision, however, would preclude this Court from referring the issues to a district court for determination, in the same manner as it refers matters to a special master.

the state of the creditor's domicile) has the right to escheat the property. *Pennsylvania v. New York*, 407 U.S. at 210-11; *Texas v. New Jersey*, 379 U.S. at 680-81. Here, the creditors entitled to claim the abandoned overpayments are the creditor brokers—not their customers. Many of the addresses of these creditor brokers appear on the debtor brokers's records. Audits of the debtor brokers conducted by the Comptroller in the past have revealed that a substantial portion of the unclaimed overpayments of the type sought by Delaware apparently were abandoned by creditors with New York addresses. New York is entitled to retain custody of all such funds. Delaware, as the state of the debtor brokers' domicile has the burden of establishing as to all items of abandoned property the absence from the debtor brokers' records of an address for the creditor broker. *Pennsylvania*, 407 U.S. at 213.

To make a complete and accurate determination of all the addresses, however, it would be necessary to reconstruct transactions from all available records. The cost to the states of doing so would be substantial and possibly exceed the small amounts to which Delaware might be entitled. It would be feasible to approximate the aggregate amount of overpayments which were abandoned by creditor brokers with non-New York addresses by examination of representative samples and apportionment on that basis.

Thus, if this Court were to accept jurisdiction, it should employ an approach similar to the technique used in *Pennsylvania v. New York* to determine the addresses of creditors for items where the cost of the search would have exceeded the amount abandoned. In that case, the Special Master recommended that the debtor, Western Union Telegraph Company, conduct a search of its records and tabulate the items regardless whether an address was available or not, both in states which were parties and those which were not. Supplemental Report of Special Master at 3; Recommended Supplemental Decree at 5-6. All the parties agreed, and the Special Master recommended, that the cost of the search should be divided among the states in proportion to the amounts they recovered from the fund. Supplemental Report of the Special Master at 3; Recommended Supplemental Decree at 5. This Court adopted the Supplemental Report on March 19, 1973. 410 U.S. 977.

In *Pennsylvania*, because it would not have been cost effective to search out addresses for small items, the parties all agreed with

the suggestion by Western Union that, rather than doing so, it would merely total these items and divide the total in the same proportion as the larger items were divided. Supplemental Report of the Special Master at 3 n.1. Here, similar considerations of efficiency mandate use of a formula based on representative samples to determine the amount of unclaimed overpayments abandoned each year by creditor brokers with addresses outside New York. Any states entitled to recover would, as in *Pennsylvania v. New York*, share in the cost of preparing and analyzing such samples based on the amount each is entitled to recover.[22]

[22] Forty-nine states employed a similar approach to settle another case in which they allocated unclaimed dividends in proportion to the purchasers of record in each state. This technique was agreed upon due to the difficulty in locating records, the paucity of existing records, the prohibitive expense of reviewing the records, the likelihood that an exhaustive review would fail to yield a more accurate percentage than the agreed upon amount, the substantial time involved to conduct the search of all records, and finally, the likelihood that the cost of the search would exceed the available funds. Report of lead counsel, *Prudential Insurance Company of America v. Alabama*, No. C4937-83E (N.J. Super. Ct. Ch. Div. filed Nov. 23, 1983). New York has lodged a copy of this report with the Clerk.

CONCLUSION

For all the foregoing reasons, this Court should deny the motion for leave to file the complaint or, in the alternative, defer addressing the jurisdictional issue until Delaware has employed the claims procedure established in the New York Abandoned Property Law.

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